

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1262

ORIGINAL

To be argued by

PHILIP R. EDELBAUM

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P/S

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

—against—

STEVEN CARDILE,

Defendant-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT STEVEN CARDILE

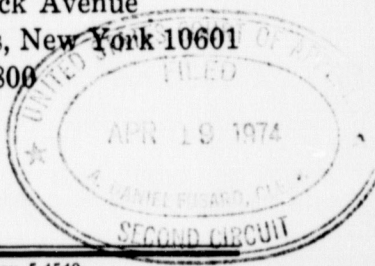
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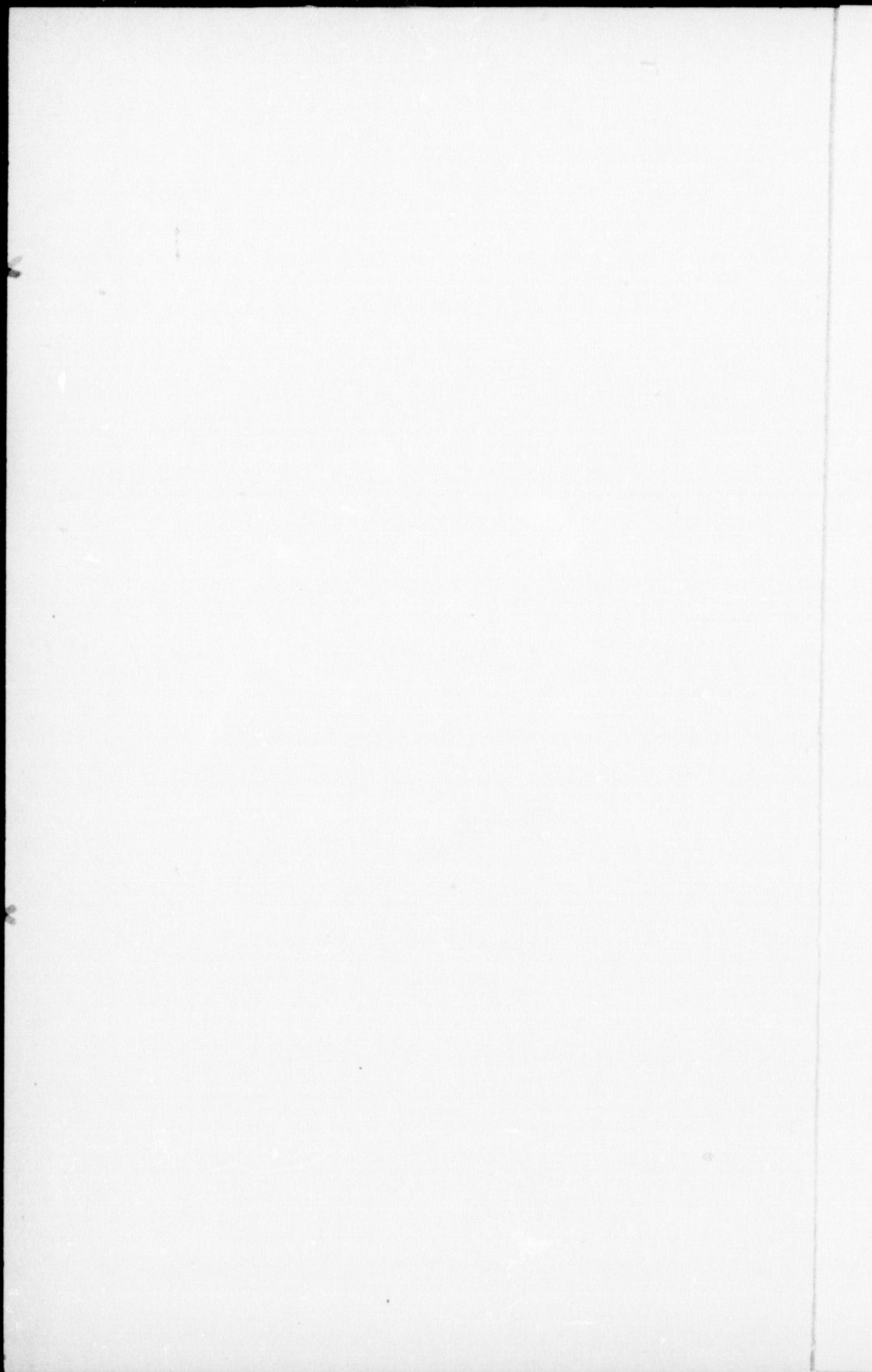
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Statement

The defendant, Steven Cardile was adjudged guilty of conspiracy to violate Sections 812, 841 (a) (1) and 841 (b) (1) (A) of Title 21 United States Code, and of unlawfully distributing a narcotic drug, cocaine, in violation of Sections 812, (a) (1) and 841 (b) (1) (A) of Title 21 United States Code, in the Southern District of New York (Robert L. Carter, D.J.) by a jury and sentenced on the 14th day of February 1974 to 3 years imprisonment, all but 6 months of a 3 year sentence being suspended and placing the defendant on special probation for a period of 3 years.

The defendant Cardile was indicted with Floyd M. Parton and Theodore Frattini. Mr. Parton testified for the government at the trial. The government produced several witnesses who adduced the following testimony:

An undercover agent of the United States Department of Justice, Drug Enforcement Administration, Douglas L. Driver, had various contacts with Floyd M. Parton, starting approximately in August 1972. During the month of October 1972 Floyd M. Parton agreed to sell an amount of cocaine to agent Driver.

Mr. Parton stated that the defendant, Steven Cardile, had showed him a sample of cocaine at the place where he worked in October 1972. On October 17, 1972, agent Driver met Floyd M. Parton at the Cross County Diner. After a conversation about price, Mr. Parton called the home of Steven Cardile and spoke to Mr. Cardile and then Mr. Frattini. Mr. Parton then testified that Mr. Frattini came to the diner and after having a conversation with Mr. Frattini in Mr. Frattini's car, he walked over to defendant Cardile's car, had a conversation with the defendant Cardile, and then was handed by the defendant Cardile a package containing cocaine. He then received \$1,700. from agent Driver and then went out to the car of Frattini and gave Mr. Frattini the \$1,700.

It is interesting to note that none of the covering agents who testified saw the defendant Cardile at the diner parking lot that night. The co-defendant, Frattini, then drove an alleged circuitous route to Cardile's house where they had a brief conversation.

The co-defendant, Theodore Frattini, testified denying all allegations of the sale, and stated that Floyd had talked to him and appellant Cardile about money he owed appellant Cardile, and that he gave him some money to pay to Cardile. The appellant, Steven Cardile, testified that he had loaned Floyd Parton, who he had previously known, \$200. in April of 1972, and that he had made a note of this and recorded the payments on the loan on a piece of paper which he kept

in a cash register drawer in his place of business. He testified on October 17, 1972 that he had received a call from Floyd at his home, which his wife answered, that he went to the diner to get the balance of the money from Floyd, and after Floyd called him, he went back home.

He had seen Frattini there and told Frattini that if Floyd gives you any money, drop it off at my house, and that later Frattini did bring some money to his house. He was accompanied in the car by his wife, Lucy Cardile, and a friend, Louis Mancuso, who corroborated the defendant's testimony.

Melvin Kaufman, a partner of Mr. Cardile, also testified as to the slip of paper with notations of the loan which was kept in the cash register drawer at their place of business. Kenneth Michael Zajac, a criminal investigator in the Westchester County Sheriff's Department, testified as a character witness for the defendant Cardile.

Relevant Constitutional Provisions

AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

ARGUMENT**POINT ONE**

The judgment of the conviction against appellant Cardile should be reversed because of the Court's improper and arbitrary refusal of granting continuance prior to the trial and during the trial.

The appellant Cardile received a notice on November 30, 1973 to appear before the United States District Court on December 3, 1973 for pleading to an indictment. Said indictment had been handed up on November 3, 1973. Appellant entered a plea of not guilty to the indictment on December 3, 1973. On December 13, 1973 the matter appeared on the calendar before the Hon. Robert L. Carter, District Judge, and the case was set down for trial on December 24, 1973. A motion for continuance was made by counsel for the appellant Cardile. The motion was granted to the extent that the trial was adjourned to January 4, 1974, which was approximately 33 days after plea was entered in the case.

In the affidavit requesting an adjournment, the court was informed that the alleged sale in this indictment took place

on October 17, 1972, which was approximately 14 months prior to the date of pleading in this case, and that appellant had tried to reconstruct the events of October 17, 1972, and tried to locate 2 witnesses for the defense, one of whom then resided in Miami, Florida, and one who was in the Atlantic City area in the State of New Jersey.

During the trial. after the last witness for the defense testified and a recess was declared until 3:30, the court was informed that a witness from Atlanta was flying in that night and that the witness would testify the following morning for approximately twenty minutes. The following is the colloquy in court at that time. (Transcript pp. 471-473)

"The Court: Who is this witness that is supposed to be coming from Atlanta? Why couldn't he get here before now?

Mr. Christiansen: It was very difficult getting this witness and as I mentioned to the Court a month ago, I did have an investigator working down there and he could not come until tonight and I just never thought that we could finish the case.

If we can just proceed to the hearing, he won't be very long. My direct won't be more than 20 minutes tomorrow morning.

The Court: Are you going to have any rebuttal?

Mr. Figueroa: I probably will have a very short rebuttal, your Honor. I don't think it will take over ten minutes.

The Court: What is he going to testify to?

Mr. Christensen: Your Honor, it is a very material element of the case.

The Court: Well, tell me what it is.

Mr. Christiansen: He is going to testify to some conversation—

The Court: You don't have to—

Mr. Christiansen: Yes. He is going to have to testify about some conversation that he had with Floyd Parton subsequent to October—I mean September 18th, the time of his arrest, and that's what he is going to testify to, concerning this case.

The Court: I am not sure, if that is going to be his testimony, that it is going to be allowed. If that is what he is going to testify to, I'm not sure it is going to be allowed.

What do you want to do, Mr. Figueroa?

Mr. Figueroa: Your Honor, whatever the convenience of the Court dictates.

The Court: Do you want to wait until this testimony is on?

Mr. Figueroa: If that is what counsel intends to have this witness here for, I would object. We have had testimony to the same effect by other witnesses and I think I would object on the grounds that it is cumulative.

The Court: I think that is right. If that's what he is going to testify to, you have had testimony from you, you have had testimony from Mr. Mancuso, you have had testimony from Mr. Cardile. I don't see where that is going to be anything more than cumulative.

All right, let us take the recess anyway."

The testimony from the witnesses Mancuso, Mr. Christiansen and the appellant Cardile, referred to by the court, was a conversation with Parton on December 3, 1973 at the arraignment of all the defendants. The conversation that was offered was a conversation the prospective witness had with Floyd Parton after his arrest on September 18, 1973. In no way could a conversation which was two months

prior to the other conversations be deemed cumulative. The motive of Floyd Parton in testifying in this case had great relevance. This offered testimony was of great importance. It was unreasonable and arbitrary at that time in the afternoon to refuse to adjourn to the following morning to hear this testimony.

This is true especially in light of the court's great rush to try this case so soon after the indictment and after counsel had indicated that he was having trouble locating witnesses. THE SECOND CIRCUIT COURT OF APPEALS Rules For Prompt Disposition of Criminal Cases was promulgated basically to protect the appellant's rights to a speedy trial. These rules were not promulgated with the intent of depriving a defendant of the opportunity to investigate and prepare a defense. If a defendant is not allowed such time to investigate and prepare a defense, the guarantee of the Sixth Amendment of the United States Constitution as to right to counsel becomes meaningless. Here there was a 14-month delay between the alleged crime and the indictment of the appellant. The government had 14 months in which to prepare its case. The appellant had to reconstruct events of 14 months prior, remember whom he was with, and try to find witnesses who were relevant to the defense in his case. Here, after defense counsel notified the court that it was having trouble finding certain witnesses, the court fixed a trial 33 days after arraignment, and then when defense counsel found one witness and informed the court that he would be present the next morning, the court refused a continuance from afternoon to morning.

The Supreme Court of the United States in *Ungar v. Sarafite*, 376 U.S. 585 (1964), at 589:

"The matter of continuance is traditionally within the discretion of the trial judge, and it is not every

denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery v. Alabama*, 308 U.S. 444. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Fretag*, 348 U.S. 3: There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva v. United States*, 352 U.S. 385: *Torres v. United States*, 270 F.2d 252."

The only basis for the court's decision in this matter was expeditiousness and convenience of the court. The court arbitrarily overlooked the appellant's rights in order to start and finish a trial at a time that was convenient to the court. In this type of case, evidence of another witness who had a conversation with the government's main witness shortly after that witness was arrested would be of utmost relevance. There was no other testimony as to a conversation at that time. See also *United States v. Bentvena*, 319 F.2d 916 (2nd Cir.), *United States v. Rosenthal*, 470 F.2d 837 (2d Cir.)

POINT TWO

The judgment of the conviction against appellant Steven Cardile should be reversed because the Court improperly received an alleged admission from the appellant Cardile after arraignment of this indictment.

The witness, Floyd Parton, was originally arrested in this case in September 1972. From his own testimony it was apparent that he then agreed to cooperate with the government at that time and was doing so from then on. Over objection of counsel, Floyd Parton testified to a conversation with appellant Cardile after the arraignment. Appellant Cardile allegedly told him in essence that he made up a story about the loan and the paper, and that the paper would be a phony. At this time Floyd Parton was cooperating with the government and was therefore an agent of the government. Defense counsel objected to this statement going in, and it is apparent that this statement falls squarely under *Massiah v. United States*, 377 U.S. 201 (1964). The court improperly allowed this testimony in. Of course, after this testimony was allowed in, the appellant in his own testimony did rebuff the testimony as did other witnesses for the appellant. After the court erroneously allowed this testimony, defense counsel could not ignore it, and the fact that this testimony was rebuffed is not any waiver of this objection under *Messiah v. United States supra*.

POINT THREE

The judgment of conviction as to appellant Cardile should be reversed because of the Court's refusal to allow testimony as to the life style and working habits of the appellant Cardile and his wife.

During the testimony of the appellant Cardile and of his wife Lucy Cardile, defense counsel tried to elicit testimony as to the hours the appellant Cardile worked in his business, and the number of people he employed. Defense counsel also tried to introduce testimony as to the number of hours Lucy Cardile, wife of the appellant, worked in her job. This testimony was offered to show the life style and working habits of the appellant and his wife to show that this was not the working habits and life style of somebody who dealt in narcotics. There was testimony as to the appellant owning his own house and two cars, one of which was an Eldorado.

To offset this testimony, an attempt was made to show that this was a product of both him and his wife working hard long hours in their respective positions and jobs, and not as a result of profiting from illicit drugs. The court, in refusing this line of testimony, prevented the appellant, Steven Cardile, from having a fair trial and deprived him of due process of law.

CONCLUSION

Appellant Cardile respectfully adopts all of the points of argument and factual contentions or recitals in the brief of the other appellant herein insofar as applicable to his case. It is respectfully submitted that the judgment appealed from should be reversed and the indictment dismissed.

Respectfully submitted,

EDELBAUM & BODNAR,
Attorneys for Appellant Cardile

PHILIP R. EDELBAUM
Of Counsel

ADDITIONAL APPENDIX**Excerpt from Defendant Cardile's Motion Dated
December 14, 1973, Re: Adjournment**

3. On November 30, 1973, the defendant notified me that he had that day received a notice to appear before the United States District Court for the Southern District of New York on December 3, 1973. The defendant and I met on Sunday, December 2, 1973 in my home, at which time the defendant stated that he was completely unaware of why he was being called before this Court.

4. On December 3, 1973, the defendant and I appeared at the call of the calendar in Room 506 of this Court and for the first time we learned that the defendant had been charged by an indictment, returned by the United States District Court for the Southern District of New York, with violations of United States Code Sections 812, 841 (a) (1), 841 (b) (1) (a) and 846 of Title 21 and Section 2 of Title 18. It is my understanding that the indictment was handed up on November 23, 1973. Defendant was duly arraigned in this Court on December 3, 1973, entered a plea of not guilty to the charges contained in the indictment and was given ten days to file motions addressed to the indictment and the propriety of those proceedings.

5. On December 11th I received a telephone call from Nicholas Figueroa, Esq., Assistant United States Attorney assigned to this case, requesting that I appear before the Honorable Judge Robert Carter on December 13, 1973. On that day I advised the Court that I had been engaged in the Westchester County Court on a criminal matter the preceding week and requested two extra days to complete my motions, which was granted. Judge Carter then set the case down for trial for December 24, 1973, exactly twenty-

*Excerpt from Defendant Cardile's Motion Dated
December 14, 1973, Re: Adjournment*

one days from the date we first received a copy of the indictment herein. It is respectfully submitted that it will be *impossible* for the defendant to properly prepare for trial by December 24, 1973.

6. The two count indictment herein charges the defendant and two co-defendants with conspiracy to distribute and for the distribution of a Schedule II narcotic drug. The sale was alleged to have occurred on or about *October 17, 1972*, which is approximately *fourteen months* prior to the date on which we received this indictment. Thus, the government has had approximately fourteen months to prepare its case and the defendant is being directed to commence a trial within twenty-one days after he first learned of the charges preferred against him.

7. At present, and for the past week, the defendant has attempted to reconstruct the events of October 17, 1972. Together, we have attempted to locate two witnesses, imperative to the defense, both of whom were employed by the defendant, Steven Cardile, in October, 1972. Neither of these defendants reside in New York State at the present time. One we have learned is in Miami, Florida and one is somewhere around the Atlantic City area in the State of New Jersey. We do not have their exact addresses and it is doubtful that I will be able to locate them prior to December 24th, this being the week before Christmas.

8. It is significant that the overt acts alleged in the indictment in pursuance of the conspiracy do not even mention the defendant Cardile but rather relate only to the co-defendants. Until we receive "Discovery and Inspection" and a "Bill of Particulars" and the other information sought herein, the defendant will remain completely ignorant as to the basis of the charges against him.

*Excerpt from Defendant Cardile's Motion Dated
December 14, 1973, Re: Adjournment*

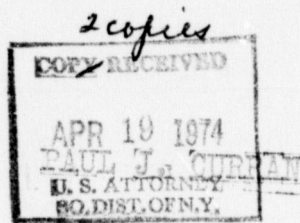
9. Mr. Figueroa, the Assistant United States Attorney, has indicated that he will endeavor to provide the defendant with the information to which he is entitled by Wednesday, December 19th; however, that will allow only two days after "Discovery" to prepare for trial, which is not nearly sufficient.

10. This is a very serious crime, one for which the defendant, if convicted, may be incarcerated for fifteen years. The defendant has no prior criminal record; in fact, he has never in his life even been arrested or charged with a crime. Now he finds himself charged with two serious crimes which are alleged to have occurred in 1972 and is directed to trial three weeks after first being apprised of the charges against him. In the interest of justice I urgently beseech this Court to grant the defendant a reasonable adjournment to prepare the defense in this matter.

Two (2)
Service of ~~three (3)~~ copies of the within
Brief is hereby admitted
this *19th* day of *April, 1974*

PAUL J. CURRAN

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Attorney(s) for USA



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